No. 83-6454

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALLEN SANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Confrontation Clause was violated by the admission of statements made by one of petitioner's co-conspirators in furtherance of the conspiracy.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 7-11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1984. The petition for a writ of certiorari was filed on March 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiracy to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to ten years' imprisonment pursuant to 18 U.S.C. 4205(b)(2).

1. The evidence at trial is summarized in the court of appeals' opinion (Pet. App. 7-8). It established the existence of a conspiracy involving petitioner, Julio Muniz, and Muniz's wife, Nereida Martinez-Davila.

In August 1982, Drug Enforcement Administration agents were conducting an investigation of narcotics dealings by Muniz and Martinez-Davila (Tr. 30-31). As part of the investigation, informant Nasario Pena introduced DEA Special Agent Leo Arreguin, Jr., to Muniz and Martinez-Davila. Pena stated that Arreguin was a friend of his and could supply kilograms of heroin. Tr. 31, 147, 166. On August 17, Agent Arreguin told Muniz that Muniz could purchase four kilos of high quality Mexican brown heroin for $100,000. Arreguin said that the price would be $30,000 per kilo if Muniz wanted to buy less than four kilos. Tr. 58-60. Muniz agreed to purchase $30,000 worth of heroin initially and said that he would produce the money later that evening (Tr. 61). Agent Arreguin agreed to supply a sample of heroin for testing after Muniz had produced the money (Tr. 61, 61a, 61b). When Muniz was unable to obtain the money that evening, Pena told Muniz to call him at his hotel after he got the money (Tr. 169).

Early the next morning, Muniz called Pena and told him that he had $15,000 at his house and was expecting to receive between $5,000 and $10,000 that morning (Tr. 170). Later that morning, Agent Arreguin and Pena went to Muniz's house in response to Muniz's request that they come to complete the heroin deal (Tr. 65-67, 170). When they arrived, Muniz told them that he had $15,000 and that he was waiting for the rest of the money to be delivered by an individual who had previously worked for him selling drugs (Tr. 67, 170).

When the man did not arrive, Muniz called someone at Agent Arreguin's request to find out what had happened. He was told that the man had gone to his grandmother's funeral but would arrive in 45 minutes (Tr. 71). While they were waiting for his

arrival, Muniz placed three other calls: one to petitioner's wife, who told Muniz that the man delivering the money would arrive shortly (Tr. 74-75); one to a man who was supposed to test the heroin sample for quality (Tr. 78); and finally, another call to petitioner's wife, who again told Muniz that the man with the money would arrive soon (Tr. 81).

Later, at Muniz's direction, Martinez-Davila went to meet petitioner at a local grocery (Tr. 83, 207). Just after she left, Muniz answered the telephone and told the caller that his wife would meet him on the corner. Muniz told the caller to give the money to her and stated that he would have a sample for him to test a little later (Tr. 86). Martinez-Davila returned with money in a large grocery bag and handed it to Muniz, who in turn handed it to Agent Arreguin (Tr. 88). Informant Pena then left the house on the pretense of going to get the heroin, but instead he obtained assistance for the arrest of Martinez-Davila and Muniz (Tr. 88-89, 90-91, 208-209).

After the arrest and while Agent Arreguin was counting the money, he answered a phone call in which the caller identified himself as the person who had delivered the money and said that he was waiting at the corner (Tr. 92-93). Meanwhile, informant Pena had driven to the grocery to call the DEA office and had seen petitioner call Muniz's house. Pena asked petitioner whether he knew Muniz. Petitioner said that he did; he acknowledged that he was the source of the money and stated that he was waiting for heroin from Muniz. Pena told petitioner that Muniz would arrive shortly, and petitioner informed Pena that he would be in the McDonald's located next door. Tr. 180-181.

Agent Arreguin arrived at the grocery, and he and Pena went to the McDonald's to meet petitioner. Petitioner again stated that he was the man who had delivered the money to Muniz, and he asked for the heroin sample. Petitioner stated that he had been followed by people whom he thought might be police officers. He

said that he wanted to receive the sample at a gas station down the block. Tr. 96-97. As the three men were leaving, petitioner spotted DEA Agent Walter Peasant, whom he recognized, and said, "Oh, not again. I knew this was going to happen." Agent Arreguin then arrested petitioner. Petitioner told Agents Peasant and Arreguin that Peasant had arrested him a few years earlier in Hammond, Indiana (Tr. 100).

2. Before the jury was selected, the court and counsel discussed Muniz's availability as a witness and the admissibility of Agent Arreguin's testimony concerning the statements made in his presence by Muniz (Tr. 13-22). During that discussion, defense counsel said: "We don't have the ability to confront Muniz" (Tr. 14). He also stated that he had been advised by Muniz's attorney that the attorney did not want petitioner's counsel to talk to Muniz (Tr. 21). The prosecutor said that it was his "understanding from talking with [defense counsel] that he originally intended to subpoena [Muniz] and was advised by his attorney he would assert the Fifth Amendment" (Tr. 21). The prosecutor also said that Muniz had refused to talk to the government (ibid.). The court then found that Muniz was unavailable to both parties. Id. Following a proffer of evidence by the government (Tr. 15-16), the judge stated that he thought that Muniz's statements were admissible and that appropriate findings would be made when the evidence was offered (Tr. 20).

During the trial, the court found that the statements were admissible under Fed. R. Evid. 801(d)(2)(E) because they were made in furtherance of a conspiracy to which both petitioner and Muniz belonged (Tr. 228-228).

3. Following conviction, petitioner appealed and argued, among other things, that his rights under the Confrontation Clause had been violated by the admission of Muniz's statements. The court of appeals, however, held (Pet. App. 11)

that the statements had been properly admitted (Pet. App. 10-11). After concluding (ibid.) that the statements qualified for admission under Fed. R. Evid. 801(d)(2)(E), the court noted (Pet. App. 11) that it had "consistently held that statements admitted under [that rule] do not infringe upon Confrontation Clause protections." The court concluded (Pet. App. 11): "Under the particular circumstances of this case, including the character of the Muniz statements admitted and the representations from lawyers for both sides that Muniz was unavailable to testify, the district court properly admitted the Muniz statements into evidence."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is, accordingly, not warranted.

1. Petitioner contends that the admission of Muniz's statements, which were admissible under Fed. R. Evid. 801(d)(2)(E), violated the Confrontation Clause as construed in Ohio v. Roberts, 448 U.S. 56 (1980). This argument lacks merit.

In Ohio v. Roberts, supra, the Court rejected a Confrontation Clause challenge to the admission of testimony given at a preliminary hearing. The Court stated (448 U.S. at 65) that "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." First, the Court stated (id.), the prosecution must sometimes demonstrate that the declarant is unavailable as a witness, but the Court added (id. at 65 n.7) that "[a] demonstration of unavailability * * * is not always required." 1/ Second, the Court observed (id. at 65-66), the Confrontation Clause contains a requirement

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1/ The Federal Rules of Evidence contain no fewer than 24 exceptions to the hearsay rule in which the availability of the declarant is immaterial (see Rule 803). Thus, a universal requirement of unavailability would revolutionalize the law of evidence.

that the evidence be reliable, but the Court noted (id. at 66) that "[r]eliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception."

2. Admission of Muniz's statements in this case was entirely consistent with Ohio v. Roberts and this Court's other Confrontation Clause cases. First, we believe that the Seventh Circuit was correct in holding that statements falling within the co-conspirator exemption from the hearsay rule automatically satisfy Confrontation Clause standards. See also, e.g., United States v. Lurz, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); United States v. Kendall, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied, No. 82-1069 (Nov. 7, 1983); 2/ United States v. Burroughs, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981); United States v. Papia, 560 F.2d 827, 831 n.3 (7th Cir. 1977); Ottomano v. United States, 468 F.2d 269, 173 (1st Cir. 1972),

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2/ Petitioner erroneously claims (Pet. 12-13) that United States v. Peacock places the Fifth Circuit among those circuits that call for a case-by-case analysis of the Confrontation Clause issue, rather than relying on the determination that a co-conspirator statement is admissible under Rule 801(d)(2)(E) as dispositive of that question. Under Peacock, it is necessary for the court to make an independent determination under United States v. James, 590 F.2d 575, 581 (5th Cir. 1979), that the prosecution has shown by a preponderance of the non-hearsay evidence, first, that a conspiracy existed; second, that the co-conspirator and the defendant against whom the co-conspirator's statement is offered were members of the conspiracy; and, third, that the statement was made during the course of and in furtherance of the conspiracy. This procedure is followed to assure that the statements properly fall within the hearsay rule, not because the Confrontation Clause imposes additional restraints. It is clear that, in the Fifth Circuit, if a co-conspirator statement is found to be admissible under Rule 801(d)(2)(E), it is deemed not to violate interests protected by the Confrontation Clause. See, e.g., United States v. Burroughs, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981); United States v. Goodman, 605 F.2d 870, 877-878 (5th Cir. 1978). Contrary to petitioner's claim (Pet. 13 n.9), the Eleventh Circuit, as noted above, also follows the rule that if a statement is admissible under Rule 801(d)(2)(E), it does not violate the Confrontation Clause. See United States v. Lester, supra. Thus, at least four circuits follow the approach taken by the Seventh Circuit in the instant case.

cert. denied, 409 U.S. 1128 (1973). Neither Ohio v. Roberts nor any other decision of this Court conditions the admission of co-conspirator statements upon a showing that the declarant is unavailable as a witness or that the statements are reliable for reasons in addition to the fact that they fall within Fed. R. Evid. 801(d)(2)(E).

3. It is true, as petitioner notes (Pet. 12-14), that some courts of appeals have stated that a case-by-case analysis is required to determine whether the witness is unavailable and, if so, whether the co-conspirator's statements are reliable. See, e.g., United States v. Ammar, 714 F.2d 238, 254-257 (3d Cir.), cert. denied, No. 83-319 (Oct. 1, 1983); United States v. Wright, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); United States v. Kelley, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); United States v. Snow, 521 F.2d 730, 734 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). However, the statements at issue were clearly admissible even under this test.

a. The trial court found that Muniz was not available as a witness for either side (Tr. 21), and the court of appeals did not disturb that finding (Pet. App. 11). Further review of that factual issue is not warranted.

In any event, the trial court's finding was correct. As previously noted (see page 4, supra), in the district court both sides agreed that Muniz was unavailable because of his intention to invoke the Fifth Amendment privilege. 3/ Moreover, because petitioner did not object to the admission of Muniz's out-of-

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3/ A witness is unavailable if his testimony cannot be obtained due to a claim of privilege. Fed. R. Evid. 804(a)(1).

Petitioner suggests (Pet. 17 n.10) that Muniz had no basis for claiming the Fifth Amendment privilege because, pursuant to a plea bargain, the charges against him relating to the events at issue here had been dismissed in exchange for a guilty plea to other outstanding charges. However, the possibility of self-incrimination with respect to parallel provisions of state law regarding conspiracy and the possession and distribution of heroin would clearly have provided a basis for invoking the Fifth Amendment privilege.

court statements on the ground that he was available as a witness, petitioner failed to preserve that objection (Fed. R. Evid. 103(a)(1)). If petitioner had raised such an objection at trial, rather than conceding that Muniz was unavailable, the government undoubtedly would have subpoenaed Muniz and required him to invoke the Fifth Amendment privilege in court. 4/

b. Muniz's statements were also reliable. Even those courts that do not regard co-conspirator statements as automatically reliable for Confrontation Clause purposes acknowledge that "'[i]n most cases, the determination that a declaration is in furtherance of the conspiracy * * * will decide whether sufficient indicia of reliability were present. While there may be exceptions, we do not think they will be frequent.'" United States v. Wright, 588 F.2d at 38, quoting United States v. Puco, 476 F.2d 1099, 1107-1108 (2d Cir.), cert. denied, 414 U.S. 844 (1973). See also United States v. Ammar, 714 F.2d at 256; United States v. Nelson, 603 F.2d 42, 46 (8th Cir. 1979). Those circuits that require a Confrontation Clause inquiry that is separate from the Rule 801(d)(2)(E) inquiry generally make the determination of reliability based upon four factors derived from Dutton v. Evans, 400 U.S. 74, 88-89 (1970). They are (United States v. Ammar, 714 F.2d at 256, quoting United States v. Perez, 658 F.2d 654, 661 (9th Cir. 1981)):

4/ Neither Barber v. Page, 390 U.S. 719 (1968), nor United States v. Fielding, 630 F.2d 1357 (9th Cir. 1980), upon which petitioner relies (Pet. 12, 16-18), shows that Muniz should be deemed to have been available as a witness under the circumstances in this case. In Barber, where the Court held that the witness was not "unavailable," the witness had agreed to waive his Fifth Amendment privilege but the state did not subpoena him even though it knew that he was in federal prison in another state and that federal law permitted his appearance (390 U.S. at 720, 723). In Fielding, the court of appeals found (630 F.2d at 1368) that, although the witness was available, the government simply had not called him to testify.

> (1) Whether the declaration contained assertions of past facts; (2) whether the declarant had personal knowledge of the identity and role of the participant in the crime; (3) whether it was possible that the declarant was relying on faulty recollection; and (4) whether the circumstances under which the statements were made provided reason to believe that the declarant had misrepresented the defendant's involvement in the crime.

The statements in the instant case satisfy this test of reliability. In substantial part, they related to Muniz's efforts to obtain the money for the instant drug transaction. While it is true that some of the statements related in part to petitioner's past role in drug trafficking efforts with Muniz, those statements clearly showed that Muniz knew of petitioner's role in these activities because Muniz and petitioner had worked directly together. There is also absolutely no reason to believe that Muniz was relying on faulty recollection. He was simply describing a longstanding business arrangement with petitioner. Finally, the circumstances under which the statements were made did not provide any reason for Muniz to misrepresent petitioner's involvement in the offense. On the contrary, Muniz thought that he was talking to other co-conspirators in the drug deal and was simply describing another co-conspirator's past activities as a means of showing his reliability in delivering money. In these circumstances, it is evident that the Muniz statements were sufficiently trustworthy to be admitted into evidence under the Confrontation Clause.

Moreover, the Muniz statements were not crucial to the government's case. See Dutton v. Evans, 400 U.S. at 87. The direct evidence offered by the government established that petitioner sent Muniz $2,880 to help finance the heroin purchase from Agent Arreguin and was waiting to test a sample of the heroin. The evidence showed that after Muniz was arrested, petitioner called Muniz's house and admitted that he had sent money to Muniz. Later, at the McDonald's, petitioner again

acknowledged sending the money and stated that he was waiting to receive the heroin from Muniz (Tr. 96-97, 180-181). 5/

The court of appeals therefore correctly rejected petitioner's claim that his Sixth Amendment rights were violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

5/ Petitioner also questions (Pet. 17) whether there should be a stronger showing of reliability when there is only "slight evidence" of the defendant's participation in a conspiracy. Here, however, there is more than "slight evidence" that petitioner was a participant in the conspiracy. As the court of appeals found, "[t]he circumstances and timing of the defendant's presence while the agents were investigating, and the defendant's own statements before arrest and when he was arrested, constitute sufficient evidence to link the defendant to a conspiracy with Muniz" (Pet. App. 10).